NO. 2963.

United States Circuit Court of Appeal

FOR THE NINTH CIRCUIT.

FORD MOTOR COMPANY, a corporation,

Plaintiff and Appellant,

vs.

E. A. FARRINGTON, and L. A. HOUCK, co-partners, doing business under the name and style of the PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,

Defendants and Appellees,

ANSWER TO PETITION FOR REHEARING.

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ANSWER TO PETITION FOR REHEARING.

In the petition for rehearing the plaintiff in error makes a new contention assailing the jurisdiction of this court; and urges for the first time that neither the lower court nor this

court has any jurisdiction of the controversy because the record does not show diverse citizenship.

POINT I.

The record affirmatively shows (tr. 5, Par. 1), that plaintiff is a foreign corporation organized and existing under and by virtue of the laws of the State of Michigan, etc., but fails to show the citizenship or residence of the defendants.

The trial was had, verdict rendered in favor of the defendant Eugene Ford Auto Company, and thereafter writ of error was prosecuted to this court whereupon the proceedings below were sustained, and now on rehearing the appellee urges reversal because of the absence of a showing of diverse citizenship. If this point is sustained, we believe the proper procedure and practice is that set forth in

Fitchburg R. Co. v. Nichols (1 C. C. A.) 85 *Fed.* 869, as follows: (page 870).

"Before Colt and Putnam, Circuit Judges, and Webb, District Judge.

Putnam, Circuit Judge. The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only

two courses open. If the plaintiff below is an alien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. Fletcher v. Peck, 6 Cranch, 87, 127; Kennedy v. Bank, 8 How. 586, 611; U. S. v. Hopewell, 51 Fed. 798, 800, 2 C. C. A. 510; Nashua & L. R. Corp. v. Boston & L. R. Corp. 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judgment of the court below must be reversed. It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paragraphs 1 and 3 of rule 11 of the circuit court. Of course, if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit. It is ordered that the judgment of the circuit court be reversed, without costs for either party in this court, and that the case be remanded to the circuit court for further proceedings according to law, unless an amendment is made in this court on or before February 1, 1898, as provided in this opinion."

Watson v. Bonfils 116 *Fed.* 157 (8 C .C. A.) (161:

"An appellate court has no power to allow such an amendment, but in cases in which there has been no issue regarding citizenship in the court below, and through the mistake or inadvertence of one of the parties the requisite averments have not been made, it may reverse and remand the case, with leave to the court below to permit their insertion, in the proper pleading by an amendment. Insurance Co. v. Rhoads, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. Ed. 380; Morgan v. Gay, 19 Wall, 81, 22 L. Ed. 100; Robertson v. Cease, 97 U. S. 646, 651, 24 L. Ed. 1057; Railway Co. v. Newcomb, 6 C. C. A. 172, 173, 56 Fed. 951, 952; Railroad Co. v. Nichols, 29 C. C. A. 464, 85 Fed. 869."

Grand Trunk Western Ry. Co. v. Reddick, 160 *Fed.* 898 (7 C. C. A.) (901):

"The trial was free from error throughout. But the judgment must be reversed on account of plaintiff's omission respecting citizenship. A question remains. How far ought the proceedings to be opened up? Defendant confessed the cause of action. The damages were properly proved and assessed. The justice of the matter is that plaintiff should not be required to go through another trial unless that course is unavoidable. Jurisdiction and merits are separate questions, and may properly be determined separately. Want of jurisdiction, by the very nature of the question, is merely a matter of abatement. If plaintiff has averred that he was a citizen of Illinois

and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined. Fitchburg R. Co. v. Nichols, 85 Fed. 869, 21 C. C. A. 464; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Everhart v. Huntsville College, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. If, after plaintiff amends, the jurisdictional averments should be denied, the issue may be tried according to the practice with respect to pleas in abatement. The judgment is reversed, with the direction to proceed in conformity with this opinion."

This practice is sustained in:

M'Eldoney v. Card, 193 *Fed.* 475 (*syllabus points* 9, 10 *and* 11, *pages* 483 *and* 484).

Because the merits of the controversy have been decided in favor of the appellees, the procedure applicable to this case is, we respectfully submit, that outlined in the authorities above, and is clearly distinguishable from such cases as:

Post v. Beacon Vacuum Pump Electrical Co. (1 C. C. *A.*) 89 *Fed.* 1 (*pages* 5 *and* 6).

Submitted herewith are affidavits showing the citizenship of each defendant which is diverse from that of plaintiff.

COSTS.

We believe that the costs of this writ of error should be taxed against the Ford Motor Co. It was the plaintiff below, and if it failed to allege jurisdictional averments when the facts warranting such allegation existed, it should not be permitted to go unwhipped of justice for its tactics.

The Federal Supreme Court has awarded costs against the plaintiff which fails to allege diverse citizenship and seeks to take advantage of its own failure, and thereby to escape a just judgment rendered against it.

In

Halsted v. Buster, 119 *U. S.,* 341 (*Bk.* 30 *L.* 462)

and

Menard v. Goggan, 121 *U. S.* 253 (*Bk.* 30 *L.* 914)

the rule is thus expressed:

> "(Syllabus, Point 2; 30 L. 914). Upon a reversal of a decree for want of jurisdiction in the court below, costs are allowed against the complainant, he having failed to put on record the facts necessary to show jurisdiction.

Reference is made to the affidavits of each defendant sub-

mitted herewith to show that jurisdiction because of diverse citizenship did in fact exist at the time of the commencement of this case so that your Honors may make proper disposition of questions, to-wit:

(a) Costs on this writ of error;

(b) Directing the lower court to permit amendments, should the defendants desire to make such, so as to frame a direct issue on the diverse citizenship of the parties.

(c) Permitting the verdict to stand until trial of that question and entering judgment accordingly.

We therefore respectfully ask that if this case is reversed that the verdict should be permitted to stand and the appellees shall be allowed to amend the pleadings so as to frame a direct issue upon diverse citizenship and that appellees be required to make proper service of their amended pleading, and the lower court directed to try such issue, and upon its determination, if it be sustained, then that judgment be re-entered upon the verdict already in the record.

POINT 2.

MERITS OF THE CASE.

At pages 4 to 17 of the petition for re-hearing the question of the necessity for a demand and tender is again presented.

At pages 9 and 10 ecrtain quotations are made from the transcript at page 257 et seq. This excerpt from the testimony of defendant and Witness Hathaway is incorrectly segregated from the other testimony to which it relates, and standing alone it gives an erroneous impression as to what the testimony was. At pages 254 to 264 the testimony of this witness discloses that the portion of the testimony quoted in the petition for rehearing is only a part of a proposed and contemplated compromise and settlement of all claims. That compromise involved the following items:

(a) The return of the $16,077.50 which the Eugene Ford Motor Company had paid for the cars.

(b) The taking over of this stock including parts and garage extras, tools, accessories, typewriter desk and fixtures at the full retail price which Winchell and Hathaway had paid therefor.

(c) The payment of the bonus money, etc.

(d) The return of the contract money.

(e) The return of the deposit money.

To clarify this situation we quote from pages 254 to 257:

"Q. Now, did you and Mr. Goden come to any understanding as to how you would sell them?

A. We told Mr. Goden that we didn't consider our contract cancelled yet, and that we had a nice business there and we didn't care to go out of it. Well, he maintained that we could see that our contract was cancelled and we just as well begin negotiating some kind of a deal for straightening it out. So he mentioned, he says, 'I have always dealt fairly with you boys. I wish you would take my advice.' He says, 'I will tell you what I advise you to do because,' he says, 'you can't afford to resist this because the Ford Motor Company—the large capital they have behind them, they will carry this thing along in the various courts, and you will get off at the little end of the horn in the long run anyway.' So we didn't know what to say or do, but he told me of a deal that he had put through up at LaGrande where the man —he told me how to get out of it easy, and that he didn't follow his advice with regard to it, and he afterwards admitted that he should have followed his advice with regard to it. So we told him that we would think it over, and we would let him know later what we thought about it.

Q. Well, did you and he finally come to any terms?

A. Well, the next morning—that evening Mr. Winchell and I talked it over and we was—well, we was undecided as to what to do. We didn't know where we were at. We felt that the Ford Motor Company would have the upper hand of us, and that we better do some-

thing, and we decided that night to accept their offer, provided they paid us back our full amount that we had invested in the cars, and that Vick Brothers took over our stock including parts and garage extras that we had for repairs, tools, and our accessories, typewriter, including a desp and various fixtures that we had, at the full retail price, that is, what we paid for them.

Q. What about the bonus money and contract money?

A. The bonus money was to be forthcoming from the Ford Motor Company; it was understood that was to be paid to us on the volume of business that we had done up to that time.

Q. Including these cars in question?

A. Including the cars in question.

Q. What about the amount you had deposited with them? Did he agree to give you that?

A. Yes, sir, we had $800.00 deposited.

Q. Did they keep that arrangement? Did they carry that out?

A. No, sir.

Q. Did Mr. Goden leave?

A. Well, we told Mr. Goden that upon the payment of that in cash that we would accept it, and that we couldn't consider anything else but a cash proposition; so he says that he could get the cash, and he says, 'You leave it to me; I will go to Portland, and I will fix this up.' So he left for Portland.

Q. And when he came back, what occurred? Tell the jury.

A. When he came back, I don't remember just how we met Mr. Goden, whether we talked to him over the phone or met him personally. Anyway we agreed to meet him at the Osborne Hotel Friday night.

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—the money. Well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why they had objected, but they had agreed to pay over the 85 per cent list price of the cars in question on the cars that we had in stock at that time.

Q. What about the contract money and the bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says 'I can't say; you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.'

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, 'I am only authorized to pay you the 85 per cent,' and he says 'I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning.'

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we could take this under advisement, and immediately Mr. Goden mentioned that the deal was all off; well, Mr. Hardy says, 'Then it is time for us to go. We will just simply take this under advisement.' And we got out, half way to the door and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; when we got out to the elevator and aw sstepping it, and he followed out there, and Mr. Vick and Md. Goden said that the deal was all off."

With the record in this condition we respectfully submit that the construction attempted to be placed upon this testimony in the petition for rehearing is incorrect and unjust.

We insist, again, that no demand as required by law, nor tender as provided in the contract, was ever made and here we repeat our former contention, in this particular case both demand and tender were conditions precedent to the existence of a right to maintain this case by plaintiff in error.

See:

Freeman v. Trummer, 50 *Ore.* 287 (292, 293);

Latham v. Davis, 44 *Fed.* 863;

People's Furniture Co. v. Crosby, 57 *Neb.* 282; 73 *Am. St.* 504.

POINT 3.

Appellees do not concede that jurisdiction in this case depends SOLELY upon diverse citizenship.

The plaintiff brought this case to enforce its alleged rights under a contract and must of necessity, rely upon such contract.

The complaint specifically refers thereto (Allegation VI, p. 6) and the contract itself was introduced in evidence as part of plaintiff's case in chief. (Tr. pp. 132-161).

The defense claimed rights which were violated by the attempted enforcement of this contract which was assailed as void and for conflict with the Anti-Trust Laws of the United States.

It is true that the court tried the case without deciding this question (Tr. p. 307); and, that this court in its opinion says:

> "But in view of the fact that the cause was tried and submitted on the theory that the contract was valid and that the rights of the parties were defined and were to be measured thereby, the inquiry is thought to be immaterial."

The defendants asserted a right because of a violation of the Anti-Trust Acts of the United States by the identical contract upon which plaintiff sought recovery, and in the brief of plaintiff in error he find this language:

> "(Pp. 24-25) It is apparent from the record that this contention of defendants is based upon the claim that the contract between the plaintiff and the defendants, as its agents, was not what its language expressed, but that instead of a consignment to an agent, the actual transaction was a sale by the plaintiff to the defendants, with an attempt to control the prices and conditions of subsequent

sales by the agents to the public in violation of the Act of Congress of July 2nd, 1890, known as the Sherman Anti-Trust Act.

"It becomes necessary therefore to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—etc."

Appellants' brief (pp. 62-155) is devoted to a lengthy discussion of the point, although there was no exception to the court's attitude.

It seems plain then, that so far as the parties to the case are concerned the following status is shown by the record:

1. At the trial the defendants urged rights arising from claimed violation of the Anti-Trust Acts, and distinctly sought relief therefor, as shown in Tr. pp. 300-308;

2. On this writ of error, the appellant concedes that the question was necessarily involved.

The question was not and is not wholly frivolous; and while it is true the lower court tried the case without regard to the determination of the asserted right, yet the failure of a federal court to sustain such asserted federal right, does *not* deprive the court of the jurisdiction to try the case.

In

Winchester v. Heiskell, 119 *U. S.* 450 (*Bk.* 30 *L.* 462), it is said at 30 L. p. 464:

> "An immunity was claimed by the appellants under this statute from the operation of the decree of the state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases.
>
> We have jurisdiction, but as the decision of the state court upon this question was clearly right, we do not care to hear further argument."

Likewise, here, Judge Bean did NOT SUSTAIN the claimed right; but the right was claimed, and it was not frivolous; the appellant concedes it to be "NECESSARY."

Under the Clayton Act this asserted RIGHT confers jurisdiction on the federal court, regardless of diverse citizenship or amount. See,

Clayton Act, U. S. Comp. St. 1916, *Vol.* 8, *Sec.* 8835-(d)-8835-(k).

This controversy therefore, was "A CASE" of which Federal Courts have cognizance.

Osborne v. United States Bank, 9 *Wheaton* 819; (Bk. 6 *L.* 204).

And the court having acquired jurisdiction to hear this question, held it for the entire controversy;

Orleans v. Steamship Co., 20 *Wall.* 392; 22 *L.* 354.

The existence of this asserted right under the Clayton Act, therefore, gave jurisdiction irrespective of citizenship or amount involved. But the appellant is not in position to urge the question here, as it took no exception to the ruling of Judge Bean. (Tr. pp. 301-307).

That the existence of a Federal question because of asserted conflict between state laws and the United States Constitution gives jurisdiction of the entire controversy is held in,

Horner v. U. S. 143 *U. S.* 576; 36 *L.* 266;
Chapelle v. U. S., 160 *U. S.* 509; 40 *L.* 510;
Scott v. Donald, 165 *U. S.* 71; 41 *L.* 632.

Judge Bean was compelled to consider the contract and our asserted rights, to decide whether such rights arose under a contract which was violative of the Clayton Act. This is what conveys jurisdictoin over the controversy.

Stewart Mining Co. v. Ontario Mining Co., 35 *S. C.* 610; 237 *U. S.* 350, *Aff'g Idaho Supreme Court.*

Jones Nat. Bank v. Yates, 36 *S. C.* 429; 240 *U. S.* 541;
Carlson v. Washington Ex Rel Curtis, 34 *L.* 717; 234 *U. S.* 103;

Holder v. Aultman Miller Co., 169 *U. S.* 81; *Bk* 42 *L.* 669 *Syllabus, point* 1.

We therefore submit that the jurisdiction in this case did not and does not depend SOLELY upon the question of diverse citizenship, and the judgment should be affirmed.

In conclusion we submit:

(a) That if the case is reversed for failure of the record to show diverse citizenship, the verdict should be permitted to stand the defendants be given the right to amend their pleadings relative thereto; that the lower court be instructed to try that issue and proceed in accordance with the authorities cited under Point 1.

(b) That the Federal question urged was not entirely frivolous and that it gave jurisdiction of the whole controversy.

(c) That the decision heretofore rendered on the question of tender and demand should stand, and the verdict be sustained.

Respectfully submitted,

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